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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH PETER ARATA, Defendant and Appellant.	C042769 (Super. Ct. No. 99F8459)

APPEAL from a judgment of the Superior Court of Shasta County, Wilson Curle, J. Affirmed as modified.

Robert D. McGhie, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, John G. McLean, Supervising Deputy Attorney General, for Plaintiff and Respondent.

Defendant Joseph Peter Arata appeals from a judgment and revocation of probation, after a guilty plea, which resulted in

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of part I of the Discussion.

a four-year prison sentence. On appeal, defendant contends: (1) he is entitled to full credit for the time he spent in local custody because he did not effectively waive his credits as applied to state prison time, and (2) the trial court erred when it imposed, pursuant to Penal Code section 1202.4,[1] a second $800 restitution fine when it had already imposed a $600 fine at the time defendant was granted probation. We agree with defendant on both points. Accordingly, we modify the judgment and remand for recalculation of defendant's custody credits.

BACKGROUND

In November 1999, defendant was charged, in a four count complaint, with corporal injury to a spouse (§ 273.5, subd. (a)), discharge of firearm in a grossly negligent manner (§ 246.3), making a criminal threat (§ 422) and brandishing a firearm (§ 417, subd. (a)(2)). Defendant waived his preliminary hearing and entered guilty pleas to infliction of corporal injury and brandishing a firearm on the condition that he would receive a grant of probation with a 90-day jail term.

In accordance with the plea agreement, the court suspended imposition of sentence and placed defendant on three years' probation with the condition defendant serve 90 days in the county jail. The court further imposed a $600 restitution fine pursuant to section 1202.4 and set forth several terms of probation.

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[1] Further undesignated statutory references are to the Penal Code.

After defendant's third violation of probation, the court imposed and stayed execution of a four-year prison term. Although the clerk's transcript indicates that defendant entered a "*Johnson*[2] waiver," the reporter's transcript of the oral proceedings provides only the following colloquy regarding defendant's sentence and any waiver of custody credits:

"THE COURT: . . . My tentative plan, and taking -- this is taking into consideration what's transpired since, well, the past year, and taking into consideration [defendant] now has custody credits that are astounding in number, what I'm going to do is I'm going to aggravate [defendant's] sentence to four years.

"I'm going to impose that sentence on [defendant] and I'm going to suspend that sentence, so it's going to be an execution suspended. This is something counsel who regularly practice in this court know that I rarely, if ever, do because I don't think that an execution suspended sentence is appropriate except in very limited areas because it ties the hands of the court.

"What I mean by that, [defendant], is that my hands will be, in essence, tied by myself. Which means that if you were to violate probation again for the merest of reasons, you have a 4-year prison sentence hanging over [your] head. And I was very constrained to find it impossible not to give you that sentence.

"DEFENDANT: Yes, sir.

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[2] *People v. Johnson* (1978) 82 Cal.App.3d 183.

"THE COURT: It gets uglier for you. I'm going to extend probation to December of '04. Essentially, almost had a year of having probation tolled since probation was provisionally suspended back in March of '01. So we're almost to that one year basis. So I'm going to extend the probation two years. That would be for the full five years. But suspend a goodly amount of that time either in custody or in a probation suspended sentence.

"So what that means, until I've got the numbers right here -- and maybe I don't have, but whenever he was sentenced, his probation was due to be up 12-20 of this year. December 20th of this year. So probation would then be up December 20th of 2004. So that's an extension of two years from when it was due to be up. And I don't find that I have a difficulty doing that with a waiver of the custody -- with a waiver on this behalf for custody credits, because he's obviously beyond the year he could get locally. Well beyond that.

"My intent would simply be at this point to give him credit for time served on this particular violation, which is a massive amount of time already. So that's my tentative plan. I suspect it's probably different that [*sic*] either of you anticipated. Again, because I'm doing something I rarely do, which is the execution suspended.

"But you should understand if I impose this sentence -- after hearing from both counsel, if I do impose this sentence, you may well still get that 4-year sentence via your own

actions. So I think we're to [defendant's counsel] for argument since it was his hearing."

After a brief pause in the proceedings, defendant's counsel submitted on his opening argument and the court's tentative ruling. The People then argued that defendant should be sentenced to four years in state prison, with no stay of execution. Before the court's final ruling, defendant's counsel added the following comments:

"[DEFENDANT'S COUNSEL]: Now, since June 19th, 2001, when he surrendered, he's actually got in -- as of today, I calculate three hundred seventy-six days of actual custody, plus a hundred and eighty-eight custody conduct credits, for a total of five hundred sixty-four. And I was going to -- the Court had actually adopted one of the suggestions I was going to make. I was going to ask that he -- first, he just be given credit for time-served and be allowed to go back to Florida.

"And this is actually something I don't recall, but the Court recalls it, and during the course of settlement. Let this guy go and let him get back to his kids. In the alternative, at that time the Court suggested he basically give a *Johnson* waiver as to good time, if the Court were to give him additional time county-wise.

"But the Court has chosen the tentative to do what I was going to suggest as a third alternative, and that would be to give him an execution suspended. It appears that everybody is on the same track that to my client[,] his children and family

come first. And I think that's an admirable thing that I don't really want to see him punished for. [¶] . . . [¶]

". . . And I would ask the Court to follow its tentative ruling."

The court then adopted its tentative ruling with, in part, the following explanation:

"[THE COURT:] A second thing that went into this thought was that given his current credits, if I were to impose the 3-year sentence -- and you may have given this some thought yourself, [defendant], but if I were to impose the 3-year sentence, he's already served it.

"In essence, with his good time credits, he could simply go to state prison, get checked in, get processed, have a cup of coffee and be out on parole. This way it's a little harsher because you can still go to state prison and then be out on parole, if you choose to violate probation. So those were two of the main things that went into my consideration. . . . [¶] . . . [¶]

"So all of those went into my decision to go back on my word, which was to give you state prison next time you goofed up. So I'm not going to do it this time. I am going to reinstate your probation from the standpoint that I am going to impose a 4-year -- the aggravated sentence here as opposed to the three years. So I'm going to suspend execution of that sentence. I'm going to place you back on probation. I'm going to extend your probation to the 20th of December, 19 -- or 2004. All the other terms and conditions of probation that were

imposed are reimposed, with the remainder you need to do the batterer's program. [¶] . . . [¶]

"All of those things I expect to be complied with. And I'll impose, with the waiver that [defendant's counsel] has offered, a sentence from June 19th to today, whatever that might be."

Defendant was then awarded 309 days of custody credit.

Thereafter, defendant, again, violated the terms of his probation. At his hearing, defendant admitted the violation of probation and requested a referral for consideration in the Addicted Offender Program (AOP). Defendant, however, was denied admission to the program due to his firearm conviction. At sentencing, defendant requested he be given credit against his prison sentence for *all the time* he had spent in local custody, including conduct credits. He maintained that he had not entered a *Johnson* waiver of his right to receive credit against his prison sentence for the time he served in local custody. Defendant was not represented at these proceedings by the same attorney that had represented him at the proceeding wherein he received the execution suspended sentence and purportedly entered the waiver. The People argued defendant had not expressly entered the waiver, but had effectively entered an implied waiver.

The court agreed with the People, stating it was obvious at the time that defendant was waiving his credits so he could avoid going to prison, that he had received the benefit of that agreement and could not avoid it simply because he did not

personally and expressly state his waiver on the record. Accordingly, defendant's prior credits were capped at one year, plus the additional credits defendant had earned since his arrest on the current probation violation, for a total of 475 days. The stay of execution on his four-year term was lifted and defendant was ordered to pay a restitution fine in the amount of $800 and an additional $800 restitution fine suspended pending successful completion of parole.

DISCUSSION

I

Defendant contends he is entitled to full credit for the time he spent in local custody because he did not effectively waive his credits as applied to state prison time.

Our Supreme Court recently explained that "a defendant may expressly waive entitlement to section 2900.5 credits[3] against an ultimate jail or prison sentence for past and future days in custody. As the United States Supreme Court has observed, '"[t]he most basic rights of criminal defendants are . . . subject to waiver."' [Citation.] This is consistent with the well-established rule allowing '"[a] party [to] waive any

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3 Section 2900.5 provides, in relevant part: "(a) In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, . . . all days of custody of the defendant, including days served as a condition of probation in compliance with a court order, and including days credited to the period of confinement pursuant to Section 4019, shall be credited upon his or her term of imprisonment . . . ."

provision . . . intended for his benefit."' [Citations.] As with the waiver of any significant right by a criminal defendant, a defendant's waiver of entitlement to section 2900.5 custody credits must, of course, be knowing and intelligent. [Citation.]" (*People v. Johnson* (2002) 28 Cal.4th 1050, 1054-1055; see *People v. Salazar* (1994) 29 Cal.App.4th 1550, 1553-1556; *People v. Johnson, supra,* 82 Cal.App.3d at p. 188.)[4]

Such a waiver allows the trial court to avoid the one-year statutory limitation on county jail sentences, thereby allowing the court to impose additional jail time as a condition of probation. (*People v. Johnson, supra,* 82 Cal.App.3d at pp. 185, 188-189; see also § 19.2.) A *Johnson* waiver may be made for other sentencing considerations as well. (*People v. Salazar, supra,* 29 Cal.App.4th at p. 1553.)

A. *Appealability*

Initially, we reject the People's contention that defendant is estopped from raising the issue of whether he waived his custody credits in connection with his January 2002 grant of probation. The People contend that, "because [defendant] did not appeal from the order granting him probation, he is estopped

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[4] The issue of whether a defendant's waiver of section 2900.5 custody credits at the time probation is imposed applies to a future term of imprisonment in the event probation is revoked is currently pending before the California Supreme Court in *People v. Arnold*, review granted June 12, 2002, S106444, *People v. Jeffrey*, review granted June 12, 2002, S105978, and *People v. Hilger*, review granted March 19, 2003, S113526.

from claiming any error regarding his *Johnson* waiver entered at that time."

The People are mistaken because defendant could not have raised this claim at that time. He was not aggrieved by the purported waiver of credits until the imposition of the present sentence, which deprived him of a substantial number of days of custody credits. Until a prison sentence was actually imposed, any injury from a nonexistent waiver of credits was merely theoretical and therefore not appealable. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 181, pp. 237-238.) His loss was apparent when he was actually given only 309 days of credit. Moreover, defendant claims in this appeal that *he did not enter a Johnson waiver* at the time of his January 2002 sentencing hearing and, as such, it is inconceivable just how the People expect him to have appealed the occurrence of something that he contends never occurred.

B. *No Knowing and Intelligent Waiver*

A waiver of presentence custody credits "must be 'knowing and intelligent' in the sense that it was made with 'awareness of its consequences.' [Citation.]" (*People v. Salazar, supra,* 29 Cal.App.4th at p. 1553; *People v. Harris* (1987) 195 Cal.App.3d 717, 725.)[5] This awareness should include an

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[5] It is unclear from the recent Supreme Court case of *People v. Johnson, supra,* 28 Cal.4th 1050 (*Johnson II*), whether a defendant must also *expressly* enter the waiver, as the issue was not presented in that case. We emphasize, however, that lengthy and confusing colloquies and discussions such as those in the instant matter create a strong case for requiring waivers to be

understanding of the impact of that waiver on the amount of time defendant may be incarcerated. (*People v. Ambrose* (1992) 7 Cal.App.4th 1917, 1922-1923.) In this case, we cannot find a knowing and intelligent waiver (or agreement) that defendant would not receive more than one year of credit for time served in county jail as a condition of probation.

In determining whether the defendant made a knowing and intelligent waiver of his right to custody credits in the event he was eventually sent to state prison, we look to the circumstances surrounding the alleged waiver. (See *People v. Salazar, supra,* 29 Cal.App.4th at pp. 1554-1556.) Here, the record is clear that defendant did not personally and expressly waive his custody credits as applied to a subsequent prison sentence. Moreover, there is nothing in the record that gives rise to a finding of implied waiver.

Our review of the record reveals ambiguity over the terms of the agreement. It appears that a certain amount of time defendant had served in county jail necessarily had to be waived to permit the court to order defendant to "time served" for his third probation violation. But the court's reference to the waiver offered by defense counsel appears to refer to a rather vague alternative sentencing suggestion made by defense counsel that defendant "basically gave a *Johnson* waiver as to good time, if the Court were to give him additional time county-wise." The

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express. In any event, although *Johnson II* does not clearly require a defendant's waiver to be express, it does continue to require the waiver to be knowing and intelligent.

record contains no other indications of the terms of the agreement.

Even to a legally trained mind, the execution suspended aggravated term, along with the "time served" sentence for the probation violation, does not necessarily suggest that defendant's jail time would not be credited to any future prison term. In fact, defendant could reasonably presume otherwise.

The court explained that "taking into consideration [defendant] now has custody credits that are astounding in number, what I'm going to do is I'm going to aggravate [defendant's] sentence to four years. [¶] I'm going to impose that sentence on [defendant] and I'm going to suspend that sentence, so it's going to be an execution suspended." The court reasoned that " . . . given his current credits, if I were to impose the 3-year sentence . . . , he's already served it. [¶] In essence, with his good time credits, he could simply go to state prison, get checked in, get processed, have a cup of coffee and be out on parole. This way it's a little harsher because you can still go to state prison and then be out on parole, if you choose to violate probation."

The court's reasoning for imposing the aggravated term necessarily presumes defendant would be credited an "astounding" number of custody credits. This is inconsistent with the position that defendant was waiving custody credits (even capped at one year) in the event he was sent to prison. It is, therefore, reasonable that defendant remained unaware that the

trial court intended any waiver of credit to apply against a potential prison sentence.

The People rely on *People v. Salazar, supra,* 29 Cal.App.4th 1550, for the proposition that defendant may impliedly waive his presentence credits by accepting probation after having been informed that the credit waiver will apply to any future prison term. Reliance on *Salazar* is misplaced on the facts of this case.

In *Salazar*, defendant contended he did not make a knowing and intelligent waiver because he did not know he was waiving credit against a subsequent prison term. (*People v. Salazar, supra,* 29 Cal.App.4th at p. 1554.) The waiver of future credits was found to be valid since the trial court had informed defendant at the hearing that the waiver would be "'for all time and for all purposes.'" (*Id.* at pp. 1553-1556.) Moreover, the probation order stated that the defendant waived all past credits "for 'all purposes.'" (*Id.* at p. 1553.) Neither defendant nor his counsel sought to correct the court on either occasion. (*Id.* at p. 1555.)

Here, there is no evidence defendant understood he was waiving custody credit against a potential state prison sentence. Defendant did not personally waive credits; only his defense counsel spoke. The trial court did not state defendant was waiving prior custody credits "for 'all time and for all purposes'" as occurred in *People v. Salazar, supra,* 29 Cal.App.4th at pages 1555-1556, on which the People rely. Nobody questioned defendant regarding his understanding of the

waiver referred to in passing by the court. (See *People v. Correll* (1991) 229 Cal.App.3d 656, 659.) The discussion that occurred when the trial court imposed and suspended the aggravated term of four years does not support an inference that county jail custody as a probation condition would not be credited against a subsequent state prison term. In short, no knowing waiver of credits is shown on the record.[6]

Finally, the fact that the clerk's transcript reports that defendant entered into a *Johnson* waiver does not affect our determination of whether the waiver actually occurred. Where the record is in conflict and cannot be harmonized, that part of the record will prevail which, because of its origin and nature, is entitled to greater credence. (*People v. Smith* (1983) 33 Cal.3d 596, 599.) In this case, we must necessarily place greater reliance on the court's oral pronouncements to defendant at the hearing and the colloquies that took place in open court, rather than on the subsequent purportedly legal conclusions of

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[6] The People's contention that defendant has "fail[ed] to demonstrate any prejudice resulting from the alleged error" because he has not shown he would not have accepted probation had the court informed him he would have to waive credits against prison time is misguided. Defendant does not contend, and we do not conclude, that the court erred at the sentencing hearing on defendant's third probation violation by not adequately informing him of the consequences of a waiver. Instead, we agree with defendant that the record does not reflect that defendant entered into a waiver against prison time at all. Thus, defendant was prejudiced by the court denying him custody credits at the time probation was revoked and he was actually sent to prison when defendant did not waive entitlement to those credits.

the court clerk. Those pronouncements and colloquies failed to establish that defendant entered into an agreement to waive his custody credits in the event he was subsequently sent to prison.

We conclude, therefore, defendant is entitled to credit against his state prison term for the actually served custody credits and conduct credits that accrued to him and remand for their recalculation.

II

Defendant also contends the trial court erred when it imposed, pursuant to section 1202.4, a second $800 restitution fine when it had already imposed a $600 fine at the time defendant was granted probation. We agree.

Section 1202.4, subdivision (b) provides that, "[i]n every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record." Subdivision (m) of that section states that, "[i]n every case in which the defendant is granted probation, the court shall make the payment of restitution fines and orders imposed pursuant to this section a condition of probation. Any portion of a restitution order that remains unsatisfied after a defendant is no longer on probation shall continue to be enforceable by a victim pursuant to Section 1214 until the obligation is satisfied."

In the absence of extraordinary and compelling circumstances, when a person is convicted of a felony, a restitution fine must be imposed, irrespective of whether

probation is granted. (§ 1202.4, subd. (b).) If probation is granted, payment of the restitution fine must be made a condition of that probation. (§ 1202.4, subd. (m).)

Despite the fact that the restitution fine is imposed as a condition of probation, however, it survives the probationary term. (*People v. Chambers* (1998) 65 Cal.App.4th 819, 822 (*Chambers*).) In *Chambers*, we said a trial court has no statutory authority to order a second restitution fine upon revocation of probation, because a restitution fine imposed as a condition of probation remained in force despite revocation of probation. We reviewed the statutes in effect when the defendant was granted probation in 1993, and subsequent statutory changes. We concluded: "There is nothing in the current statutory scheme to suggest any change in the Legislature's intent to have a restitution fine survive the revocation of probation. Indeed, the statutory scheme suggests otherwise. Restitution fines are required in all cases in which a conviction is obtained. Furthermore, there is no provision for imposing a restitution fine after revocation of probation. The triggering event for imposition of the restitution fine is still conviction. (. . . § 1202.4, subd. (b).)" (*Chambers*, *supra*, 65 Cal.App.4th at p. 822.)

The instant case falls squarely within *Chambers*. In *Chambers*, the defendant pleaded no contest to first degree burglary and was granted probation. As a condition of that probation, she was ordered to pay a $200 restitution fine. (*Chambers*, *supra*, 65 Cal.App.4th at p. 821.) Four years later,

the trial court revoked the defendant's probation, sentenced her to state prison and imposed a second restitution fine of $500. We held that because the first restitution fine remained in effect, the trial court was without authority to impose the second restitution fine. (*Id.* at p. 823.)

The holding in *Chambers* is dispositive of the case at bar. Consistent with the pertinent statutory provisions, the trial court imposed a $600 restitution fine as a condition when it placed defendant on probation on December 21, 1999.[7] Three years later, the trial court revoked defendant's probation and imposed a second restitution fine in the amount of $800.[8] The trial court was without authority to impose the second restitution fine. (*Chambers, supra,* 65 Cal.App.4th at p. 823.)

Although the People have routinely conceded this issue for several years, they inexplicably seek to defend the error in this case. We reject their arguments.

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[7] Although the court's oral pronouncement does not specifically reflect the imposition of the $600 restitution fine, the court stated it was following the probation report's recommendation that included the $600 fine and the clerk's minutes of the proceedings reflect the imposition of the $600 fine. In any event, the People concede that the court imposed a $600 fine at the time probation was initially granted.

[8] The clerk's transcript, however, inaccurately reflects the restitution fine imposed as: "THE COURT, having previously ordered the defendant to pay a restitution fine of $800.00 pursuant to Penal Code Section 1202.4, THE COURT NOW ORDERS, an additional restitution fine in the amount of $800.00 which shall be SUSPENDED unless defendant's parole is revoked pursuant to Penal Code Section 1202.45."

Citing section 1202.4, subdivision (m), the People improvidently contend that the trial court was entitled to impose a restitution fine as a condition of probation in addition to the restitution fine mandated by subdivision (b). Subdivision (m) does not contain language authorizing an additional discrete fine. As reflected by its express terms (set forth above), subdivision (m) is no more than a direction to the trial judge to impose the restitution fine mandated by subdivision (b) on probationers as a condition of probation. Failure to do so would lead to successful probationers avoiding the mandatory nature of subdivision (b).

Alternatively, the People assume from the silent record that the defendant did not pay the $600 restitution fine imposed as a condition of probation and appear to argue defendant is therefore only liable for the $800 fine imposed when he was committed to prison. This is incorrect because a restitution fine imposed as a condition of probation survives a subsequent revocation and state prison commitment. (*Chambers, supra*, 65 Cal.App.4th at p. 822.) Defendant is either entitled to credit for its payment or is responsible for paying it during and, if necessary, after his prison sentence.

Since the restitution fine had already been imposed at the time defendant was initially granted probation, the subsequently imposed fine was improper. Additionally, because the corresponding restitution fine stayed unless defendant's parole is revoked (§ 1202.45) must be in the same amount as the

restitution fine, that fine must be reduced to $600. (*People v. Smith* (2001) 24 Cal.4th 849, 851, 853.)

DISPOSITION

The judgment is modified by striking the $800 restitution fine, leaving in force the $600 restitution fine originally imposed pursuant to section 1202.4, subdivision (b), and reducing to $600 the additional restitution fine imposed and stayed pursuant to section 1202.45. The matter is remanded to the trial court to recalculate defendant's custody credits. The court shall include all credit accumulated by defendant as a condition of his probation. As modified herein, the judgment is affirmed.

The trial court shall enter an amended abstract of judgment reflecting the recalculated custody credits and the reduced restitution fines and forward a certified copy of the same to the Department of Corrections. (*CERTIFIED FOR PARTIAL PUBLICATION*.)

NICHOLSON, J.

We concur:

SIMS, Acting P.J.

BUTZ, J.